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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1954.
No. 721

LEW WAH FOOK, as Guardian *ad Litem* for LEW SUEY YET, also known as LEW THEW YUT,

Petitioner,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Respondent.

Petition for Writ of Certiorari From a Decision Had in the United States Court of Appeals for the Ninth Circuit.

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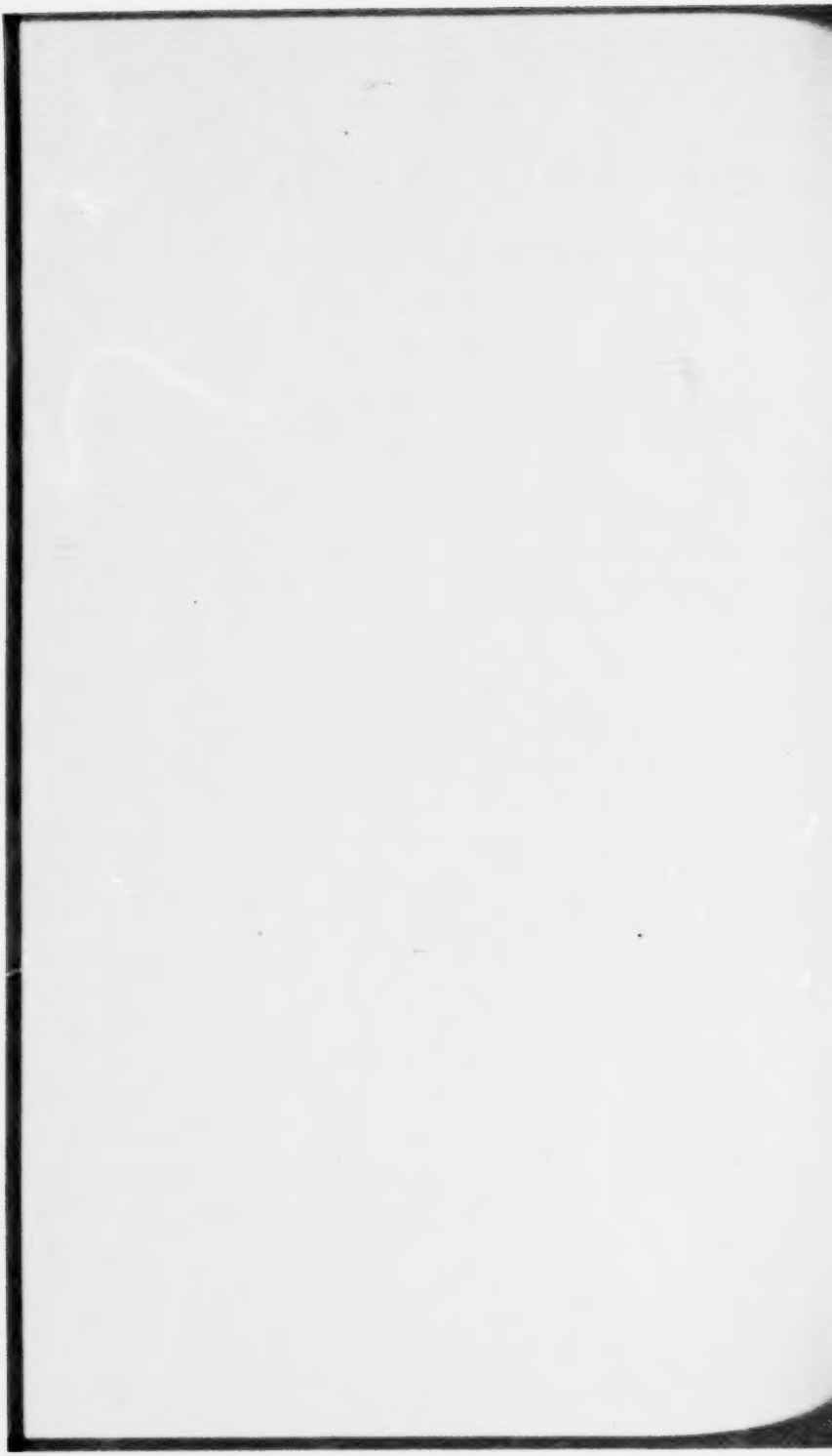

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Respondent.

Petition for Writ of Certiorari From a Decision Had in the United States Court of Appeals for the Ninth Circuit.

Comes now Lew Wah Fook, as guardian *ad litem* for Lew Suey Yet, also known as Lew Thew Yut, and respectfully petitions this Honorable Court as follows:

I.

That on the 14th day of January, 1955, in Case No. 14106, a *Per Curiam* Opinion of the United States Court of Appeals for the Ninth Circuit was rendered. That this is the Judgment or Decree sought to be reviewed herein. That said Opinion was filed, entered and recorded in the Minutes of the United States Court of Appeals for the

Ninth Circuit on said 14th day of January, 1955. That attached hereto and made a part hereof as if set forth in full is a copy of the written Opinion of January 14, 1955, hereinbefore referred to, marked Exhibit "A."

II.

That no request has been made for a rehearing and consequently no Order respecting a rehearing has been made, and no Order has been made granting an extension of time within which to file a Petition for Certiorari.

III.

The statutory provision believed by petitioner to confer on this Honorable Court jurisdiction to review the Judgment or Decree hereinbefore referred to by Writ of Certiorari is pursuant to the provisions of Title 28, U. S. C. A., Section 1254, subdivision (1), which provides as follows:

> "A case in the Courts of Appeal may be reviewed by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree;"

IV.

The questions presented for review are as follows:

A. Should a person of Chinese ancestry be declared a citizen or national of the United States where the testimony of such person and his witnesses with reference to his being the son of a United States citizen is uncontradicted by competent evidence, where no testimony is offered by the United States

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and where no substantial or material inconsistencies are developed on cross-examination of such person and his witnesses?

B. Should the mere fact that a female name was given petitioner (a male child) by itself constitute sufficient grounds to deny United States citizenship where the alleged father, Lew Wah Fook, gave detailed testimony, explaining the birth of petitioner and the reasons surrounding his birth and the fact he did not know that petitioner was, in fact, a boy until he visited the home village in 1946 while he was in the Army and on leave?

V.

The pertinent statutes, laws and regulations of the United States involved in this case are as follows:

A. Section 1993, Revised Statutes of the United States. (Acts of April 14, 1802, and February 10, 1855, before amended by Act of May 24, 1934, Sec. 1, 8 U. S. C. A. 601(g).)

This Act has since been amended in 1952, but was the law applicable at the time petitioner was born. Such act in as far as applicable to petitioner reads as follows:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

B. Act of October 14, 1940, Chap. 876, Title I, subchapter 5, Section 503, 54 Stat. 1171 (8 U. S. C. A., Sec. 903).

This section in as far as it is applicable to petitioner provides as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right of privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a National of the United States. * * *."

This statute was repealed in 1952, but was the pertinent jurisdictional law in effect at the time petitioner's action was filed in the District Court below.

VI.

A concise statement of the case containing the facts material to the consideration of the questions presented is as follows:

Petitioner, Lew Suey Yet, also known as Lew Thew Yut, by and through his guardian, Lew Wah Fook (his alleged father) filed in the United States District Court for the Southern District of California, Central Division, a petition and amended petition seeking a declaratory judgment of United States citizenship. The action was brought pursuant to the statute then in effect, to-wit:

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Section 503 of the Nationality Act of 1940 (8 U. S. C. A.), hereinbefore referred to. The petitioner claims to have acquired United States citizenship at the time of his birth, in accordance with the United States Nationality Statute then in effect. Petitioner claims to be the lawful blood child of Lew Wah Fook. It was conceded by the respondent at the time of trial before the District Court that Lew Wah Fook, the alleged father, was and now is a citizen of the United States. It was likewise conceded by respondent at the time of the trial of this matter that his two sons, Lew Mon Soong and Lew Mon Hing were admitted to the United States from China as American Citizens, through derivative citizenship of the father, Lew Wah Fook (Guardian *Ad Litem* of Petitioner herein), effective July 1, 1952.

Petitioner arrived in the United States port of entry in 1951 with his two older brothers, above referred to, and the said two older brothers were admitted to United States citizenship but petitioner herein was detained by the Immigration and Naturalization authorities, pending a determination of his status. The Board of Special Inquiry of the Immigration and Naturalization Service held a hearing at San Pedro, California, on June 28, 1951, and determined that appellant herein was not a citizen of the United States and was not admissible to the United States as such. Thereafter the Board of Immigration Appeals on July 1, 1952, affirmed this decision excluding petitioner from United States citizenship. Thereafter on July 10, 1952, appellant filed his petition in the Court below, by and through his guardian *ad litem*, Lew Wah Fook, to have his claim of citizenship determined by the District Court.

Lew Wah Fook testified before the District Court that he was born January 18, 1913, in China, in Lung Uck Village; that on his first trip to China from the United States in 1929 he married Huie Shee Yee; that his marriage was in the same village where he was born, and was according to the Chinese marriage customs and ceremonies; that his oldest child is Lew Mon Soong, born November 9, 1930, and that his next son is Lew Mon Hing or Hung, born December 2, 1933; that he had a third child born September 9, 1935, named Lew Suey Yet; that the portion of the name of Yet can also be spelled Yut. This latter child is the petitioner herein. He testified that his sons Lew Mon Soong and Lew Mon Hing have been admitted to the United States and are in Los Angeles, California, and that his third son, petitioner herein, was sitting at the Council table when he, Lew Wah Fook, was testifying. He testified that upon his return from his second trip to China he gave information to the Immigration and Naturalization Service that he had two male children, Lew Moon Seung and Lew Moon Hin, and that his wife was seven months pregnant.

Lew Wah Fook further testified that when he left China to return to the United States at the conclusion of his second trip that his older two children were in the village living with his wife, the mother of said two sons, and that he had not seen them since said second trip, until February, 1946, when he saw them in the same village and the same house that he had occupied when in China; that this visit was occasioned by a 90-day leave given him by the United States Army when he went back to the village to visit his family in China; that they were living in the same house, in the same village where

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his family had lived when he made both the first and second trips to China. He testified that he saw his son, petitioner herein, for the first time when he went to the village on his United States Army 90-day leave. He identified appellant herein as the son he saw upon his arrival in the United States in 1951 as the same son he saw in China in 1946 when he had his Army furlough.

The testimony before the District Court reflects that Lew Wah Fook, when he returned from his last trip to China (before going there on 90-day leave in 1946 when he was in the Army) he stated to the Immigration and Naturalization Service that he had two sons and his wife was seven months pregnant. He further testified that he received correspondence from his wife that she had given birth to a child, giving him the name which was a female name, and the date of the child's birth. He stated that he assumed from the name that the child was a female, and that no one advised him to the contrary, and that until he went to China on his 90-day furlough he had always assumed that the child was a female until he actually saw petitioner and ascertained that he was a male child. The alleged father further testified that when he ascertained in 1946 that petitioner was, in fact, a male he was very joyous and demanded immediately an explanation as to why he had not been informed of the fact that the child, in fact, was a boy. He advised the court that under Chinese customs, in his absence his mother acted as head of the family and was a highly superstitious woman, and that by reason of a ritual common in China concerning the length of the life of children, petitioner would apparently live longer as a girl than as a boy, and that his mother therefor arbitrarily, as head of the family, gave peti-

tioner a girl's name and instructed all the rest of the family not to tell the alleged father that it was a boy, and to either advise him that it was a girl or keep quiet and not tell him it was, in fact, a male. He further testified that when he ascertained petitioner was, in fact, a boy he wanted to have an immediate ceremony and celebration and change the name to a boy's name. However, his mother again insisted that by reason of the superstitions and rituals common in China, the boy would have to reach the age of 18 before such a process could be undertaken; otherwise his health would be in jeopardy. He also stated that the family did not inform him of the true sex of the child because they knew he did not believe in the Chinese religion or spirits and was a Christian, and that if he were told the true situation he would naturally refuse to carry out the antiquated customs and would insist on a celebration. There was further lengthy testimony concerning the birth of petitioner.

In furtherance of his explanation, Lew Wah Fook testified, at pages 76-77 of the printed Transcript of Proceedings before the Court of Appeals, as follows:

> "The Witness: It was in 1946 that I first found out it was a boy instead of a girl. Naturally, I was very joyous of the fact and I demanded an explanation. The explanation was that my mother, who was a highly superstitious woman, at the time when the child was born, she went to this idol that they have and through this process of the idol, they shook these little bamboo sticks that have characters in them, and in that way she can get the name for the boy. The name came out from the bamboo sticks stating that it is a girl's name, and the explanation said that if the child was born and was born a boy, with a boy's name, the child would not

live long, so it must be a girl. So subsequently when the child was born and they found out it was a boy, my mother sought to offset the spirits by giving the boy a girl's name, and instructed all the rest of the family not to tell me it was a boy, but to inform me, if they ever had the chance to write to me, to either keep quiet about it or tell me it was a girl.

The Court: When did you get this information? When did you find out this information?

The Witness: When I went back to China in 1946 and I saw my child, and by his features I knew it was a boy. I demanded an explanation. It was at that time that they told me what went on. Right away I was denied of a joyous celebration because it was a boy, and at that very moment when I found out, I wanted to make a ceremony and change the name to a boy's name, but my mother would not let me do so, stating the boy would have to reach the age of 18 before such a process can be undertaken; otherwise, his health would be in jeopardy."

Lew Mon Soong was called as a witness for petitioner and testified that he was born November 19, 1930, in Lung Uck Lee, China, and arrived in the United States May 27, 1951; that from the time of his birth he lived in the same village until going to Hong Kong, which was about a year before he left for the United States; that his brothers, Lew Mon Hing and petitioner, Lew Suey Yet, lived with him at all times in the village and that the three boys went to Hong Kong together; that his father was Lew Wah Fook, the man that came to Court with him, and that his mother's name was Huie Shee Yee, and that his brothers, Lew Mon Hing and Lew Suey Yet lived with the mother in their home in

the village until his mother died. He identified his next brother, Lew Mon Hing as being in the witness room with him at the time of the trial, and the petitioner, Lew Suey Yet, as his brother, sitting at the counsel table, and that he had played with petitioner since he could remember, and recalled seeing his father in the village in 1946.

Lew Mon Hing testified, as a witness for petitioner, that he was born in Lung Ock Village, China, and that his father's name was Wah Fook and his mother's Hui Shee, and that he had an older brother, Lew Mon Soong, who testified the day before and exchanged places with the witness in the witness room. He identified the witness, Lew Wah Fook, as his father, and that he has a younger brother, his No. 3 brother, Thew Yet, who was sitting at the counsel table next to Mr. Brennan, attorney for petitioner in the District Court. He stated that he came to the United States with his brothers, Lew Mon Soong and petitioner, Lew Suey Yet, and that the three brothers lived together in the home village and came to Hong Kong together; that he recalled seeing his father in 1946, and that his brothers, Lew Mon Soong and Lew Suey Yet were both living in the same village at the time his father was there, and that all were part of the same household.

Lew Suey Yet, testified that he desired to be a permanent resident, in the Southern District of California, Central Division of the Trial Court, and that his father was Lew Wah Fook; that this was the same person who had been in Court with him in the adjacent witness room; that his mother was Hui Shee Yee; that he was born in Lung Ock Li, September 9, 1935; that he came to the United States with his two older brothers, Lew Mon

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Soong and Lew Mon Hing; that prior to coming to the United States he had lived in the same village with his brothers and his family prior to coming to Hong Kong, and went to Hong Kong with the same two older brothers. He stated he recalled seeing his father, Lew Wah Fook, in February of 1946, when he was about eleven years of age, in the home village, and that the person he knew then as his father is the same person he identified in Court, and that the two brothers he mentioned in Hong Kong and his home village are the same two he identified in the Trial Court.

At the conclusion of the trial in the District Court below, sitting without a jury, the respondent presented no witnesses and the District Court found for the respondent.

Thereafter petitioner caused a timely appeal to be taken to the United States Court of Appeals for the Ninth Circuit, and said Court of Appeals rendered its decision as hereinbefore referred to and as set forth in Exhibit "A" on January 14, 1955, affirming the decision of the District Court in favor of respondent and against petitioner herein.

That petitioner has been heretofore advised that Paul P. O'Brien, Clerk of the United States Court of Appeals for the Ninth Circuit, under date of March 21, 1955, forwarded an original and nine copies of the printed Transcript of the Record in the above matter, together with a typewritten Transcript of Proceedings had in said Court of Appeals. That petitioner hereby refers to and incorporates by reference said printed transcript for the aid of this Honorable Court with reference to the pleadings and testimony and other pertinent matters the Court desires to consider.

VII.

This petition concerns a review of the Judgment of the Federal Courts, to-wit: the United States District Court, for the Southern District of California, Central Division, and the Circuit Court of Appeals for the Ninth Circuit. The basis of Federal jurisdiction in the Court of the first instance concerns the same statutes, rules and regulations as set forth in paragraph III above.

VIII.

The argument of petitioner amplifying the reasons relied upon for allowance of the Writ is as follows:

The issues involved in this petition involve the priceless right of United States citizenship and as this Honorable Court has stated in *Kwock Jan Fat v. White,* 253 U. S. 454, 464; 40 S. Ct. 556, 570; 64 L. Ed. 1010:

> "It is better that many Chinese immigrants should be improperly admitted than one natural born citizen of the United States should be permanently excluded from this country."

The Court of Appeals for the Ninth Circuit has likewise held on many occasions that no special quantum of proof should be exacted from any person claiming American citizenship merely because of racial origin.

The Record and Transcript of Proceedings before the District Court and before the Circuit Court of Appeals (9 copies of which printed Record have been forwarded by the Clerk of the Circuit Court of Appeals) clearly reflect that petitioner, his alleged father and his alleged two brothers gave adequate testimony to sustain petitioners' burden of proof concerning the claimed relationship between petitioner and his alleged father. It

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is submitted that relationship is now usually proven by physical facts and by pedigree, reputation in the family, and by the conduct of the parties, including the manner in which they live. Thus the fact that a small child lives in the home of his alleged parents and that they maintain toward each other the obligation involved in their relationship is evidence favorable to the issue. It is submitted that such evidence is not collateral but is direct and material evidence on the issue of the claimed relationship. It would appear that the Honorable District Court and the Honorable Circuit Court of Appeals disregarded unimpeached and uncontradicted testimony concerning the relationship of petitioner.

From a close scrutiny of the entire record and the reporter's transcript it appears that the main and sole point that led the Trial Court to find for the respondent was that petitioner is in fact, a male, yet was given at his birth the name of a female. It is submitted that by reason of the logical explanation of Lew Wah Fook, the alleged father, and the positive testimony and identification of the two older brothers that the Trial Court erroneously indulged in conjecture rather than following the undisputed testimony and evidence.

From the testimony of Lew Wah Fook it can be readily deduced that the oriental mind with its superstitions, rituals and other ways of life is vastly different in many respects from the occidental mind. It is submitted that the admitted facts and testimony, to-wit, that Lew Wah Fook left China when his wife was seven months pregnant with petitioner, coupled with the admitted testimony that he did not return until 1946 when he had his leave in the United States Army, reflects that he had no actual observation nor had seen for himself whether petitioner

was male or female. Further, the admitted facts, based upon his tetsimony that the correspondence he had received stated that petitioner was given a female name would naturally and normally lead him to believe that petitioner was of that sex. It is completely logical and understandable that he was overjoyed when he returned to China in 1946 and found that rather than having a daughter he had a male child. Apparently Chinese fathers take great stock in having a male child rather than a female child. His explanation further seems logical, that he immediately wanted to have a celebration to change the name of petitioner to that of a male but that he was unable to persuade his mother, who apparently carried great weight in the community, to allow the change. It seems readily apparent that the trial judge in the District Court based his entire opinion on the naming of petitioner when he was born and the fact that the alleged father did not know the sex until 1946. It is respectfully submitted that this fact alone, to-wit, the sex and name of petitioner, when examined in light of all of the testimony and evidence introduced at the time of trial should not have swayed the mind of the trial court to indulge in conjecture and, therefore, purportedly disbelieve the testimony of the father, petitioner and his witnesses.

As the matter of citizenship and nationality of one who claims to be an American citizen is such an important and fundamental right, petitioner earnestly submits that this Honorable Court should give consideration to his petition and grant a Writ of Certiorari in order to review all of the proceedings before the trial court and the Circuit Court of Appeals for the Ninth Circuit.

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IX.

As hereinbefore set forth, nine copies of the printed Transcript of the Record of all proceedings which were had in the District Court and which were before the United States Court of Appeals for the Ninth Circuit and a transcript of the Record of the Proceedings of the Court of Appeals, which is the Judgment sought to be reviewed, duly certified by the Clerk thereof, have been heretofore forwarded by the Clerk of the United States Court of Appeals. Petitioner hereby incorporates by reference said printed Transcripts and records of the proceedings in the Courts below.

Wherefore, petitioner respectfully prays that this Honorable Court issue a Writ of Certiorari.

Dated: April 12, 1955.

C. W. CORNELL,
BERNARD C. BRENNAN,
WILLIAM E. CORNELL,
By C. W. CORNELL,
Member of the Bar of the United States Supreme Court,
Attorneys for Petitioner.

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EXHIBIT "A."

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

Lew Wah Fook, as Guardian *ad litem* for Lew Suey Yet, also known as Lew Thew Yut, Appellant, vs. Herbert Brownell, Jr., as Attorney General of the United States, Appellee. Civil No. 14,106.

Filed January 14, 1955.

Appeal from the United States District Court, Southern District of California, Central Division.

Before: Stephens, Fee, and Chambers, Circuit Judges *Per Curiam.*

Lew Wah Fook, guardian *ad litem* for Lew Suey Yet, also known as Lew Thew Yut, brings this action under §503 of the Nationality Act of 1940 (8 U. S. C. A. §903) to have it declared by the District Court that the ward is a citizen of the United States. The guardian and the ward both claim the guardian, a citizen of the United States, is the natural father of the ward.

The trial court found contrary to the claim and the only point on appeal is that the evidence not only does not support the judgment but requires just the opposite finding.

So far as we have seen, this is the plainest of cases in which we are asked to retry the facts. Appellant asks us to apply the doctrine of the case of United States v. United States Gypsum Co., 333 U. S. 364-395, wherein is is held, "Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings of administrative agencies or by a jury, this court (Supreme Court and this court, too, of course) may

reverse findings of fact by a trial court where 'clearly erroneous' . . . A finding is clearly erroneous where although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." This simple statement does not convert the appellate tribunals into fact finding *de novo* trial courts. The presumption of correctness of the trial court, the view of the witnesses and the live feel of the open forum are all ingredients of the compound which we may adjudge as valid or "clearly erroneous." By this test in the instant case, the judgment is not clearly erroneous. However, even if we should approach the problem as the original triers of fact upon the bare record, our conclusion would be the same. We briefly digest sufficient of the evidence to support our conclusions.

The guardian says he is the ward's father, and the ward says the guardian is his father. "The mere say so of interested witnesses does not have to be accepted . . ." Flynn *ex rel.* Yee Suey v. Ward, 104 F. 2d 900-902. See Sin Say v. Mable, 295 F. 676, wherein is stated: "In cases of this character, experience has demonstrated that testimony of the parties in interest as to the *mere fact of relationship cannot be safely accepted or relied upon.* . . ."

The guardian has previously stated that a third child (following two sons) had been born a female named Lew Siu Ngoot. The child was 9 years old when the statement was made. It is claimed that the ward in this proceeding was the child referred to. The guardian testified that he thought for years the child was a girl and only found the error upon visiting the family years

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after the child was born. The child bore a girl's name and an elaborate, practically impossible tale was told in explanation. The court saw and heard the witnesses and stated frankly that it did not believe the story. It is true that a court cannot cast aside, without reason, a straight account of fact, but testimony as improbable, and we might say as fantastic, as the one related in this case need not be believed even if there is no one to go on the stand to refute it. The principle is so plain and fundamental that any citation of authorities would be superfluous. However, we cite one of the latest, Carr v. Yokohama Specie Bank, Ltd., S. F., 200 F. 2d 25 (1952).

Affirmed.

(Endorsed:) *Per Curiam* Opinion. Filed Jan. 14, 1955.

Paul P. O'Brien, *Clerk.*